SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1060~~ 70-49

STATE OF HAWAII,
*Petitioner,*

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
and CHEVRON ASPHALT COMPANY,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. xiv-xx[1]) is reported at 431 F.2d 1282. The opinion of the district court (Pet. App. pp. i-xiii) is reported at 301 F.Supp. 982.

### STATUTE INVOLVED

Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or

1. "Pet. App." herein refers to the appendix to the petition for a writ of certiorari.

has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## QUESTION PRESENTED

This is a suit in three counts by the State of Hawaii to recover treble damages from respondents under section 4 of the Clayton Act for alleged violation of the Sherman Act. In Count One, the state seeks to recover treble damages for injury it alleges it has suffered in its proprietary capacity as a purchaser of refined petroleum products. Count Two purports to allege an additional cause of action for damages—an action to recover treble damages for alleged injury to the general "economy and prosperity" of the state. Count Three purports to plead a class action for treble damages with the state as the representative of a single class composed of every purchaser of refined petroleum products in Hawaii. On interlocutory appeal, the court below directed dismissal of Count Two.

The question presented is whether, in addition to the right of a state to recover treble damages under section 4 of the Clayton Act for any injury to its business or property, and in addition to the right of its citizens, individually or in an appropriate class action, to recover treble damages for any injury they have sustained to their business or property, a state may also sue to recover treble damages for alleged injury to the general "economy and prosperity" of the state.

## STATEMENT OF THE CASE

This is an action by the State of Hawaii against respondents for treble damages under section 4 of the Clayton Act and for an injunction under section 16 of that Act. Count One of the Fourth Amended Complaint is the whole of the original complaint.[2] It alleges that respondents conspired to fix prices for refined petroleum products in Hawaii, to the damage of the state in its proprietary capacity as a purchaser of such products (1 R. 50).

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2. Apart from an abandoned Robinson-Patman count

Count Two, first added in a Second Amended Complaint, repeats the allegations as to conspiracy and purports to allege a cause of action for injury to the general "economy and prosperity" of the state:

> "19. The State of Hawaii * * * brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.
>
> "20. The unlawful contracts * * * have injured and adversely affected the economy and prosperity of the State of Hawaii * * * *" (1 R.50-51)[3]

Count Three purports to allege a class action, the class pleaded including every Hawaiian citizen who purchased refined petroleum products.

Respondents moved to dismiss the *parens patriae* count on the ground that it failed to state a claim upon which relief could be granted, and moved to dismiss the class action on the ground, among others, that a class composed of all of the citizens of the state who purchased refined petroleum products is not a proper class under Rule 23 (Fed. Rules Civ. Proc.).

The district court granted the motion to dismiss the class action without prejudice, but declined to dismiss the *parens patriae* count. In ruling on the *parens patriae* count, the court recognized that under the decisions of this Court:

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3. The economy and prosperity of the state are alleged to have been adversely affected as follows:

> "(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;
>
> "(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;
>
> "(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
>
> "(g) the Hawaii economy has been held in a state of arrested development."

"* * * the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct" (Pet. App. p. viii).

But it held:

"While a state may not sue, *parens patriae*, for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity" (Pet. App. p. ix).

On motion of respondents under 28 U.S.C. § 1292(b) the district court certified for interlocutory appeal its ruling sustaining the *parens patriae* count (1 R.68). The court of appeals reversed the decision of the district court. The court noted that no question concerning the class action was before it.[4] It emphasized that Hawaii's claim under Count Two was for alleged injury to the general economy and prosperity of the state as a politically organized community, which, Hawaii asserted, had an existence independent of any injury to the state in its proprietary capacity, or to its citizens individually or in the aggregate:

"Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves. Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries" (Pet. App. pp. xviii-xix).

With respect to such a claim the court pointed out that "the general economy is an abstraction," and expressed doubt that "an

4. Petitioner declined to appeal the ruling on class action, although invited by the district court to do so (infra, p. 9, n. 9).

independent harm to the general economy" could exist. However, "assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role," it held that Hawaii's claim for damages was clearly outside the scope of section 4 of the Clayton Act for either of two reasons: (1) An injury to the general economy of the state, separate and apart from an injury to the state in its proprietary capacity, is not an injury to the "business or property" of the state; and (2) in any event, such an injury would be so remote, indirect and consequential as to fall outside the area of direct injury contemplated by the Clayton Act (Pet. App. pp. xix-xx).

## ARGUMENT

There is no conflict of decisions. The decision of the court of appeals is correct.

1. There is no right of action under the antitrust laws except as "a federal statute has created that right" (*Nashville Milk Company v. Carnation Company* (7 Cir. 1956) 238 F.2d 86, 88, aff'd, (1958) 355 U.S. 373). The rights and remedies of one seeking treble damages under the antitrust laws arise exclusively from section 4 of the Clayton Act (15 U.S.C. § 15; *Vance v. Safeway Stores* (D.N.M. 1956) 137 F.Supp. 841, 845-46, aff'd, as to this point (1958) 355 U.S. 389). Section 4 of the Clayton Act (formerly section 7 of the Sherman Act) provides:

> "Any person who shall be injured *in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *" (emphasis added).

Thus the cause of action provided by the Clayton Act is for treble damages for "any person who shall be injured in his business or property." It does not provide a cause of action for treble damages for "injury and adverse effect" upon the "economy and prosperity" of a state in its sovereign capacity.

In *Georgia v. Evans* (1942) 316 U.S. 159, this Court held that a state is a "person" within the meaning of section 4 of the Clay-

ton Act and could bring an action under that section for treble damages suffered in its proprietary capacity as a purchaser of asphalt for use in the construction of public roads. In so ruling, this Court construed section 4 to give to a state the same "remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. 162):

> "The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. 162).

The right of a state to sue for treble damages under the anti-trust laws—the same right which is available to all other persons and which was sustained by this Court in *Georgia v. Evans*—is the right which is pleaded in the case at bar in Count One of the complaint. Under that count Hawaii may obtain an injunction and may also recover treble damages for any injury to its "business or property," as can each of its citizens, individually or in appropriate class actions, for any injury to his business or property. But these two categories comprise all of the damages resulting from injury to the business or property of anyone—the state and all its citizens. A separate and additional injury to the nebulous concept of the "general economy," or "general welfare," or "general prosperity" of the state in its sovereign capacity is not comprehended within the language of section 4 of the Clayton Act.[5]

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5. Nor could damages for such an injury meet the test laid down in *Keogh v. C. & N.W. Ry. Co.* (1922) 260 U.S. 156, 165, where this Court, speaking through Mr. Justice Brandeis, said:

> "* * * recovery [of damages under the Clayton Act] cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable."

As the court below held, the terms "business" or "property" in section 4 of the Clayton Act are to be construed in their ordinary sense:

> "An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under § 4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms 'business or property' are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community." (Pet. App. p. xix)[6]

2. The second ground of decision by the court of appeals is also in accordance with an unbroken line of authorities under section 4 of the Clayton Act. As stated by the court:

> "Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection." * * *
>
> "The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act" (Pet. App. p. xx).

Petitioner argues that the foregoing ruling fails to recognize a more recent line of cases which have liberally interpreted the foreseeability test under section 4 of the Clayton Act (Pet. 42). But as the court below pointed out, an injury to the general "economy and prosperity" of a state as a socially organized entity—in its sovereign capacity—"is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" (Pet. App. p. xx). This ruling is in accord with numerous

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6. In addition to the authorities cited by the court (Pet. App. pp. xix-xx), see:
*Triangle Conduit & Cable Co. v. National El. Prod. Corp.* (3d Cir. 1945) 152 F.2d 398, 399-400;
*Peller v. International Boxing Club* (7th Cir. 1955) 227 F.2d 593, 595-596; and
*Image and Sound Service Corp. v. Altec Service Corp.* (D.Mass. 1956) 148 F.Supp. 237, 239.

authorities.[7] The authorities cited by petitioner (Pet. 41-47) are not to the contrary. Indeed, they support the decision below.

3. The real basis of petitioner's prayer for a writ is the contention that this Court should allow the *parens pattiae* action because "By dismissing the class action (Count Three), it may be reasonably inferred that the [district] Court recognized that each of [Hawaii's] citizens had no practical or effective individual remedy in their own right" (Pet. 10), and that, therefore, unless the state is allowed to sue for damages, respondents will be permitted to retain their "illegal profits."[8]

The first and complete answer is that this contention is directly contrary to the language of the Clayton Act. Section 4 provides:

> "Any person who shall be injured in *his* business or property * * * may sue therefor * * * and shall recover threefold the damages by *him* sustained * * *" (emphasis added).

Section 4 does not provide a cause of action for a state to recover damages suffered by persons other than itself, any more than it allows any other plaintiff to recover damages suffered by another. Petitioner simply asks this Court to amend the antitrust laws. As this Court remarked in another connection "The argument is misaddressed. It would be within the proprieties if addressed to Congress" (*Lauritzen v. Larsen* (1953) 345 U.S. 571, 593). The court below emphasized the same consideration in ruling on Hawaii's claim for damages for injury to its general "economy and prosperity" (Pet. App. p. xx):

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7. In addition to the authorities cited by the court below (Pet. App. p. xx), see:

*Conference of Studio Unions v. Loew's Inc.* (9th Cir. 1951) 193 F.2d 51, certiorari denied (1952) 342 U.S. 919;

*Twentieth Century Fox Film Corporation v. Goldwyn* (9th Cir. 1964) 328 F.2d 190, 220, certiorari denied 379 U.S. 880; and

*Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.* (8th Cir. 1966) 368 F.2d 679, 688-89.

8. This argument is rephrased and repeated throughout the petition. See, for example, pages 5, 15, 16, 17, 23, 27, 28, 48 and 51.

"Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study."

But beyond this, petitioner's argument has no support in the record in this case. The class action which petitioner pleaded in Count Three named as a single class every purchaser of refined petroleum products in Hawaii. Such a "class" would include virtually every citizen of Hawaii. It would be unmanageable, as the district court held, and would also fail to comply with Rule 23 in other material respects. For example, it would include members with directly conflicting claims such as consumers who purchased at the allegedly fixed prices and retailers who allegedly participated in the conspiracy to fix these same prices. However, there is nothing in the district court's opinions or orders which holds that there can be no proper class action or actions. The action of the district court in dismissing the class action was without prejudice:

"* * * I would hold that, under the circumstances right now, the class action based upon the injury to every individual purchaser of gasoline in the State, to me at the present time, in the context of the pleadings, would be unmanageable.

"I'm not prepared at this time to go ahead with the class action as counsel has pled it because I feel that it would be unmanageable under the present context of the case.

"The motion to dismiss Count III is granted, without prejudice, however. If you can come up sometime later with something that the Court feels that the Court can manage, we'll reconsider it" (3 R.155).[9]

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9. The district court offered to certify its ruling on the class action along with its companion ruling on the *parens patriae* count. Petitioner declined:
"THE COURT: * * * the motion for certification under * * * section [1292(b)] for a *parens patriae* count is * * * granted. Counsel will prepare the necessary orders and I'll sign the same. "Now, do you want certification of your class action?
[Counsel for Hawaii]: "No, your Honor" (3 R. 156).

Arguments similar to those made by petitioner were considered and rejected by Chief Judge Lord in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057, appeal dismissed, Nos. 18, 384-85 (3d Cir. Feb. 2, 1970), where the court held that *parens patriae* suits by the states of California and Kansas would not lie to recover damages under the Clayton Act for injuries allegedly sustained by the citizens of those states:

> "But plaintiffs contend that if this Court denies them the right to amend their complaints so as to assert [*parens patriae*] claims to recover damages on behalf of individual citizen-consumers, those citizens with small stakes in this massive litigation will have no adequate remedy to vindicate their rights against defendants. * * * For they contend that the individual citizens cannot as a practical matter sue for themselves or get an adequate remedy in situations like those of the present cases.
>
> "The Court cannot accept plaintiffs' argument. In the 113 cases now before this Court for pretrial proceedings, there are numerous cases in which various plaintiffs claim the right to represent as classes under Rule 23 individual homeowners, owners of apartment houses, owners of commercial buildings and others at the consumer-level alleged to have sustained injury. * * * Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject" (309 F.Supp. 1062).

4. Petitioner also contends that the decision of this Court in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, supports its alleged cause of action as *parens patriae* for treble damages. However, as the court below noted, the *Georgia* case decided only the question of the right of the state, as a quasi-sovereign, to sue for and obtain an injunction under section 16 of the Clayton Act.

In its bill of complaint in the *Georgia* case, Georgia pleaded one count as a proprietor, but in the counts in which it sued *parens patriae*—as a quasi-sovereign—it did not seek to recover treble

damages under the Clayton Act. Instead, as a quasi-sovereign, it merely sought "token damages" for the injuries it alleged its general economy and prosperity had suffered, conceding that actual damages were impossible to compute:

> "It is likewise impossible accurately to calculate the damage done to the people of Georgia over the decades as an organized community as a direct result of the acts of the defendants complained of herein. * * * It is respectfully requested that the Court award the State of Georgia token damages as a representative of the people—as a quasi-sovereign—in an amount which the State of Georgia submits should not be less than five million dollars" (Count Two of Georgia's amended bill of complaint).

In its brief in this Court, Georgia conceded that damage to the state as a sovereign or quasi-sovereign "transcends measurement in pecuniary terms" and is "perhaps incapable of estimate in money," and the state waived all claims to damages other than "token or nominal" (Brief on Behalf of the State of Georgia on Motion to File Amended Bill of Complaint, pp. 7, 29).

This Court said:

> "Georgia sues in four capacities, only two of which we need mention: (1) in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State" (324 U.S. 443).

This Court then held that its prior decision in *Keogh v. C. & N. W. Ry. Co.* (1922) 260 U.S. 156, was alone a barrier to recovery of any damages. It pointed out, however, that this "does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction" (324 U.S. 453), and went on to consider whether the state, in her capacity as a quasi-sovereign, had standing to sue for *injunctive relief* against the "continuing wrong" of the alleged conspiracy.

Chief Judge Lord, in his opinion in the *Philadelphia Housing Authority* case (p. 10, supra), correctly observes that no issue with

respect to the right of a state in its sovereign or quasi-sovereign capacity to recover treble damages under the Clayton Act was before this Court in the *Georgia* case:

> "Nor does the *Georgia* case, supra, itself lend any support to the type of damage claim for which leave to amend is here sought. In fact, in the only 'parens patriae' claim considered by the Court in its opinion, that set forth in Count 2 of Georgia's complaint, Georgia did not even seek damages on behalf of individual citizens, nor for that matter treble damages under the antitrust laws at all, though it did seek treble damages in its proprietary capacity under Count 3 of its complaint. For in its prayer for relief set forth at pages 24-27 of its complaint, Georgia requested as damages under Count 2, that it be awarded 'token' damages in the amount of five million dollars as a representative of the public as damages for harm and injury to the economy of the state as a whole" (309 F.Supp. 1061-62).

Notwithstanding the foregoing, petitioner seeks to read into the passing use by this Court of two plural nouns in its opinion in the *Georgia* case a "holding" that a state may sue to recover treble damages under section 4 of the Clayton Act (Pet. 30-31). It refers to the following two passages, in which this Court, in sustaining the right of Georgia to sue for an injunction, said:

> "But when it came to other [than criminal] *sanctions* Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies*, it restricted the States to suits to protect their proprietary interests" (324 U.S. 447) (emphasis added).
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action [for an injunction] to this Court fail" (324 U.S. 452) (emphasis added).

Two plural nouns, used incidentally in the course of an opinion, do not, of course, support the "holding" petitioner purports to

find in *Georgia*. It is settled that "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" (*Webster v. Fall* (1925) 266 U.S. 507, 511).[10] In *Georgia*, the question whether a state, suing in its quasi-sovereign capacity, may recover treble damages under the Clayton Act for an alleged injury to its general "economy and prosperity" did not even "lurk" in the record. No such claim was pleaded, considered by the Court or anywhere mentioned.[11]

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10. See also *Nashville Milk Co. v. Carnation Co.* (1958) 355 U.S. 373, 376, n. 5; and see the dissenting opinion (355 U.S. 383).

11. The Special Master in *Georgia* (Lloyd K. Garrison) found that the evidence failed to support the allegations that Georgia had been the victim of a conspiracy directed against it *as a state*, and that, in consequence, the state had no standing to sue *parens patriae*. Of this case Professor Freund has since remarked:

> "Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss * * * the complete inability of the state to make good its claim of injury as *parens patriae* suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy" (Freund, Book Review (1951) 3 J.Leg.Ed. 643, 644, n. 2).

If Hawaii were allowed to maintain its *parens patriae* count, Professor Freund's comments would again be appropriate. As Hawaii's Department of Planning and Economic Development recently noted:

> "Dramatic as the [United States'] economic expansion has been [since February 1962—the low point of the last recession], Hawaii's has been more dramatic. Further, this expansion has been shared in some degree by all sectors of Hawaii's economy" (Dept. of Planning and Economic Development of the State of Hawaii (1969) The Economy of Hawaii 3).

Assuming the high cost of living allegedly shown by petitioner's off-the-record chart (Pet. 39), Hawaii provides another instance of the familiar observation that inflation is often accompanied by increased economic activity. Perhaps this is why the court of appeals was "skeptical of the existence of an independent harm to the general economy" of Hawaii (Pet. App. p. xix).

The *Georgia* case was dismissed *per curiam* by consent of all parties after the master's report was filed ((1950) 339 U.S. 975) but before it was considered by this Court ((1950) 340 U.S. 889). In the meantime Congress had passed the Bulwinkle Act ((1948) 62 Stat. 472) authorizing the Interstate Commerce Commission to approve and immunize from the antitrust laws combinations of the character complained of in the case.

The district court acknowledged that never before had a *parens patriae* suit for damages been permitted, unless *Georgia* itself could be so characterized (Pet.App. p. v.). However, this Court was quite explicit in stating, in the *Georgia* case, the rationale of its decision, for it said:

> "Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits [i.e., those long recognized] should be excluded from the purview of the antitrust acts" (324 U.S. 447).

The "long recognized" suits *parens patriae* have been exclusively for equitable relief, not for damages. Moreover, in *Georgia* the Court did not hold that the *parens patriae* doctrine expanded Clayton Act suits beyond the limits of the Act itself, and section 4 of the Clayton Act limits the remedy of damages to one who has been injured "in his business or property".

5. As a final point, petitioner (Pet. 48-52) seeks to revive a proposition which was made to and rejected by the district court and which was not before the court below. Indeed, it is directly contrary to the theory petitioner argued to that court. The proposition is that, even though a state may have no right to sue for treble damages under the Clayton Act for an alleged injury to its general economy, it should be permitted to sue, *parens patriae*, to recover treble the damages its citizens may have suffered. The contention was rejected by the district court on the authority of numerous decisions by this Court holding that a state has no standing to sue *parens patriae* for the benefit of particular individuals or for injuries sustained by its citizens for which they may sue in their own behalf.[12] The decision of the district court on

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12. *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277;
*Oklahoma v. Cook* (1938) 304 U.S. 387;
*North Dakota v. Minnesota* (1923) 263 U.S. 365;
*Louisiana v. Texas* (1900) 176 U.S. 1; and
*N.H. v. Louisiana: N.Y. v. Louisiana* (1883) 108 U.S. 76.

For a discussion of the principles relating to the standing of a state to sue *parens patriae*, see Malina and Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193 (1970).

this point is in accord with the decision in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057, referred to above (pp. 10, 12). Petitioner's contention is, moreover, directly contrary to the specific language of section 4 of the Clayton Act (see p. 8, supra).

## CONCLUSION

There is no conflict of decisions. The opinion of the court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# In the Supreme Court
OF THE
# United States

October Term, 1970

No. 1060

State of Hawaii,
*Petitioner,*
vs.
Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company,
*Respondents.*

## PETITIONER'S REPLY BRIEF

### I. THE STATE OF HAWAII, AS PARENS PATRIAE, DOES POSSESS STANDING UNDER SECTION 4 OF THE CLAYTON ACT.

The respondents' Brief in Opposition to the present petition for writ of certiorari attempts, in an overly-simplified manner, to sweep away and bury the significant issues raised by the Ninth Circuit's decision in our

present case. An example of the confusion is illustrated in the respondents' statement of the "Question Presented" as follows:

> "... whether, *in addition* to the right of state to recover treble damages ... for any injury to its business or property, and *in addition* to the right of citizens ... to [so] recover ..., a *state may also sue to recover* treble damages for alleged injury to the general economy and prosperity of the state." (Brief for Respondents in Opposition, p. 2.) (Emphasis added.)

In fact, the primary issue herein is whether, under *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439 (1945), the injury suffered by State of Hawaii as *parens patriae* as a result of respondents' price fixing conspiray was an injury to its business or property within the meaning of Section 4 of the Clayton Act.

Respondents further over-simplify the thrust of petitioner's argument as one which urges this Court to recognize the standing of the State of Hawaii herein to seek damages in order to prevent respondents from retaining their "illegal profits" derived from their antitrust violation. (Brief for Respondents in Opposition, p. 8.) Respondents assert that such an argument should be addressed to Congress, not the Courts. (Brief, pp. 8-9.)

Respondents thus ignore that this Court's decision in *Georgia v. Pennsylvania Ry. Co., supra,* established that an antitrust injury to the State is an injury which has been recognized by the law, and is one which Congress intended to remedy under the "purview" of existing "antitrust acts". 324 U.S. at p. 447. Thus, an injury to

the economy and prosperity of the State of Hawaii in its *parens patriae* capacity is "property" (i.e., "an interest which the law protects") within the meaning of Section 4 of the Clayton Act. See *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

Respondents readily admit, as they must, the propriety of suits *parens patriae* for equitable relief. (Brief, p. 14.) However, they totally ignore the historical parallelism as to the interests protected by Section 4 (treble-damage remedy) and Section 16 (injunctive relief) of the Clayton Act. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). It is anomalous to contend that an antitrust violation of the nature alleged herein, causes legal injury sufficient to accord the State standing as *parens patriae* to seek an injunction under Section 16, but not sufficient to accord standing to obtain damages for the legal injury suffered under Section 4. If there is an antitrust injury to a legally protected interest (i.e., "property") of the plaintiff, then that plaintiff may seek *all* available "remedies" and marshall all statutory "sanctions" under the federal "antitrust acts." 324 U.S. at p. 447.

The only exceptions to the above are found in those rare cases (such as *Georgia v. Pennsylvania Ry. Co.* itself) where a supervening federal policy (e.g., prohibition of rebates in the transportation industry) militates against the award of such damages. In all other instances, including our present case, the policy of the law strongly favors the availability of private damage actions as an important component in the vigilant enforcement of na-